No. 22364 and A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEVERAGE DISTRIBUTORS, INC.,
a corporation,

Appellant,

vs.

OLYMPIA BREWING COMPANY,
a corporation,

Appellee.

OLYMPIA BREWING COMPANY,
a corporation,

Appellant,

vs.

BEVERAGE DISTRIBUTORS, INC.,
a corporation,

Appellee.

Appeal from the United States District Court for the Northern District of California

REPLY BRIEF OF CROSS-APPELLANT OLYMPIA BREWING COMPANY

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ERRATUM

In its answering brief, p. 1, Olympia referred to its answering argument as appearing in Section V of the brief and to its opening argument as appearing in Section VIII. These references should have been to Sections IV and VII respectively.

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I

INTRODUCTION

By its cursory response to Olympia's argument on cross-appeal, BDI has attempted to minimize the significance of what it labels "the limited injunction which the Court did grant." [BDI Ans. Br. 19.] Rather than meet the only issue involved, i.e. whether the extraordi-

nary remedy of preliminary injunction was proper relief on the facts presented, BDI skirts the obvious answer by throwing out two red herrings: *first*, that Olympia was not entitled to terminate relations with a customer in furtherance of conduct which violates the antitrust laws; and *second*, that Olympia will not suffer irreparable damage by continuance of the preliminary injunction until trial. [BDI Ans. Br. 19.] Neither of these propositions, Olympia submits, is relevant, supported by the evidence, or persuasive.

What is, on the other hand, of critical importance is the nature of the relationship between Olympia and BDI. For, just as in *Scanlon v. Anheuser-Busch, Inc.*, 1968 TRADE CASES, para. 72,355 (9th Cir. 1968), recently decided by this Circuit, that relationship was one terminable at the will of either party. [2 R.T. 35]. The trial court in effect wrote a new contract for the parties and invested BDI with a status never previously enjoyed by it and not presently enjoyed by any other distributor of Olympia beer in California.

As a result, the court's order amounted to a mandatory direction that Olympia continue supplying a distributor with whom it had an arrangement without tenure, by whom its servicing and merchandising policies were not satisfactorily pursued, and in whom it had lost confidence. Such an order exceeded proper exercise of the equitable powers of the court in this type of case, and should not be allowed to stand.

II

ARGUMENT

1. The order-to-order arrangement between Olympia and BDI is terminable at will and not amenable to specific enforcement or mandatory injunction.

As Olympia's letter recognizing and welcoming BDI as one of its distributors makes clear [R. 208], there is no relationship between the parties for which any consideration or value was exchanged. BDI was simply recognized as a wholesaler whose requests for supplies of Olympia beer would be reviewed and filled on an order-by-order basis. No right to continue to distribute Olympia beer was acquired by BDI, and conversely, Olympia acquired no right to prevent BDI from discontinuing its Olympia distribution. As nothing was purchased by BDI, in the event of termination it had nothing to sell. In short, as the trial court recognized, there is no contract of distribution. [2 R.T. 35].

The effect of this is twofold. Where the distributor has no tenure, enjoining termination necessarily requires the performance of affirmative and continuing acts which could not properly be specifically enforced. See *Alpha Distributing Company of California, Inc. v. Jack Daniel's Distillery*, 207 F. Supp. 136 (N.D. Cal. 1961) aff'd 304 F.2d 451 (9th Cir. 1962); *Long Beach Drug Co. v. United Drug Co.*, 13 Cal.2d 158 (1939). Clearly distinguishable are such cases as *F. K. Weingartner v. Union Oil Co. of California,* 1966 TRADE CASES, para. 71,757 (N.D. Cal. 1965), cited by BDI, in which a preliminary injunction operates to preserve, pendente lite, an *existing contractual relationship.* The order-to-order relationship between these parties makes it impossible for BDI to show any facts which could support either specific performance or injunction. *Makel Textiles, Inc. v. Pellon*

Corp., 1964 TRADE CASES, para. 71,241 (S.D.N.Y. 1964); *Alpha Distributing Co. of Cal. v. Jack Daniel's Distillery,* supra.

Whether *Olympia* will or will not be irreparably damaged is beside the point [BDI Br. 19]. BDI cannot show its right to the relief granted. The relationship between the parties gave Olympia the right to effect termination at any time within its discretion.

More significantly, however, the fact that the relationship between the parties is terminable at will emphasizes the appropriateness of a remedy at law for damages and the impropriety of injunctive relief before trial on the merits. As BDI apparently concedes [Suppl. to Complaint, R. 39], the only legitimate inquiry upon termination of such a relationship is whether reasonable notice should have been or was given. *Alpha Distributing Co. of Cal. v. Jack Daniel's Distillery,* 207 F. Supp. 136, 138 (N.D. Cal. 1961) aff'd 304 F.2d 451 (9th Cir. 1962); *Millett Co. v. Park & Tilford Distillers Corp.,* 123 F. Supp. 484 (N.D. Cal. 1954). This issue affects the question of money damages only.

2. Olympia should not be required by preliminary injunction to supply a distributor in whom it has lost confidence.

Because the arrangement between Olympia and BDI was from its inception terminable at will and for any cause, Olympia is not required to justify its refusal to fill BDI's orders. *Scanlan v. Anheuser-Busch, Inc.,* 1968 TRADE CASES, para. 72,355 (9th Cir. 1968); *Ace Beer Distributors, Inc. v. Kohn, Inc.,* 318 F.2d 283 (6th Cir. 1963), cert. denied 375 U.S. 922 (1963), reh. denied 375 U.S. 982 (1963). A manufacturer has the right to select its customers and to refuse to sell its goods to anyone, for

reasons sufficient to itself, so long as an unreasonable restraint of trade does not result. *Ace Beer Distributors, Inc. v. Kohn, Inc., supra; United States v. Colgate & Co.,* 250 U.S. 300 (1919).

Both *Scanlan* and *Ace Beer* demonstrate that termination of a beer distributorship in a competitive market, with no effect on the availability of competing products, is neither an unusual business procedure nor an unreasonable restraint of trade in violation of the Sherman Act.

But Olympia submits in addition that its termination of BDI was amply justified under the special circumstances of their relationship. For, as reiterated in the *Scanlan* opinion, " 'the anti-trust laws do not require a business to cut its own throat.' " [*Brown v. Western Massachusetts Theaters, Inc.,* 288 F.2d 302, 305 (1st Cir. 1961) quoted with approval in *Scanlan v. Anheuser-Busch, Inc.,* 1968 TRADE CASES, page 84,964.]

The relationship between a brewer and its distributors must necessarily be a close and personal one, dependent upon mutual trust and confidence. [Hannah affidavit, R. 204]. The peculiarly volatile nature of the commodity puts a premium on efficient handling and servicing, while the highly competitive nature of the market makes proper merchandising essential. The enthusiastic support and co-operation of the distributor is key to the manufacturer's possibility of success. [Comments by the trial court, 2 R.T. 23-25].

Such a relationship of confidence and co-operation became impossible once BDI filed suit. [Hannah affidavit, R. 204-5].

BDI's attempt to divert the justification for termination from Olympia's loss of confidence to resentment over

its new order finds no support in the record. The trial court clearly recognized that Olympia's decision was an independent one and treated it as separable from the question of fair trade.

Because Olympia had not undertaken to terminate BDI before its receipt of the new orders has no significance at all. After BDI filed suit, but prior to these orders, Olympia reasonably assumed that BDI had abandoned distribution of its beer. [Hannah depo. 127]. It was not until receipt of the new orders that Olympia had occasion to exercise its customary right of review on a sale-by-sale basis. Presented with them, Olympia justifiably determined that it should no longer recognize BDI as one of its distributors.

Contrary to the argument of BDI, this determination is consistent with the rationale of *Bergen Drug Company v. Parke, Davis & Company,* 307 F.2d 725 (3rd Cir. 1962), where it was found that the relationship between the parties has been *impersonal* and the product a non-sensitive one requiring no facility in handling or merchandising. Such factors preclude application of *Bergen* to this case. Here service is of the essence. It would be unreasonable and unwarranted to expect Olympia to entrust the marketing of its product to a vexacious distributor. Certainly such risk should not be imposed by preliminary injunction. *Alpha Distributing Co. of Cal., Inc. v. Jack Daniel's Distillery,* 207 F. Supp. 126, 138 (N.D. Cal. 1961) aff'd 304 F.2d 451 (9th Cir. 1962).

Albrecht v. The Herald Company, ...U.S....., 19 L.ed.2d 998 (1968) is no comfort to BDI in this regard. Despite a passing reference to plaintiff's termination "in response" to the filing of an antitrust suit [19 L.ed.2d 1001; BDI Br. 15], it is clear that the decision turned on the Court's finding of a combination to fix resale prices

of newspapers, illegal per se under the Sherman Act. The Herald's refusal to deal was infected with the vice of resale price fixing, and not surprisingly, was viewed with disfavor. On the other hand, the trial court here has made no finding that BDI was terminated in furtherance of a price fixing conspiracy. Indeed, Olympia's fair trade policy is expressly permitted under State law and therefore sanctioned by the Sherman Act. [Olympia Br. 13-14]. Neither *Albrecht* nor *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) impairs the vitality of *Colgate* on the facts of this case.

Finally it should be noted that *Albrecht* arose only after full jury trial on the merits, and its very posture as an action for damages is persuasive that BDI's remedy, if any, should properly lie at law and not in equity.

CONCLUSION

Because Olympia had dealt with BDI only on an order-to-order basis under an arrangement terminable at the will of either party, it was entitled to terminate that relationship at any time without cause. The relationship is inherently incapable of specific enforcement, and accordingly should not be subject to preliminary injunction. An adequate, and indeed the only proper remedy is available at law after full trial on the merits. Olympia therefore respectfully submits that it be relieved from continuing to supply a distributor no longer meriting its confidence.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

By.....
John C. McHose